No. 87-1179

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

RUSSELL T. WEIL and VIRGINIA L. WEIL, STUART S. DYE and MARY I. DYE, ROBERT J. HICKEY and ELEANOR L. HICKEY, and RUSSELL T. WEIL, RONALD A. CAPONE, and JILDA C. GARITY, as Executor, Administrator cta, and Administratrix cta, respectively, of the Estates of Ronald A. Capone and Margaret L. Capone,

Appellants,

against

RODERICK G. W. CHU, FRANCIS KOENIG, and MARK FRIEDLANDER, constituting the State Tax Commission of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Dated: February 5, 1988

Questions Presented

1. Whether New York may tax nonresident partners of a New York partnership on their allocated distributive share of income from the partnership without violating the due process, equal protection, commerce, and the privilege and immunities clauses of the United States Constitution, where the nonresident partners perform no services for the partnership in New York.

2. Whether New York Tax Law § 620, which gives residents but not nonresidents, a credit against New York income taxes for income taxes paid to other jurisdictions violates the privileges and immunities, the equal protection nor the commerce clause of the United States Constitution.

3. Whether the United States Constitution was violated by the termination, effective for years after 1975, of a letter agreement in which the filing of New York income tax returns requirement was waived for the years 1967 through 1971 for employees and a nonresident partner who performed services outside of the state for a New York partnership.

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No. 87-1179

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RUSSELL T. WEIL and VIRGINIA L. WEIL, STUART S. DYE and MARY I. DYE, ROBERT J. HICKEY and ELEANOR L. HICKEY, and RUSSELL T. WEIL, RONALD A. CAPONE, and JILDA C. GARITY, as Executor, Administrator cta, and Administratrix cta, respectively, of the Estates of Ronald A. Capone and Margaret L. Capone,

Appellants,

v.

RODERICK G.W. CHU, FRANCIS KOENIG, and MARK FRIEDLANDER, constituting the State Tax Commission of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of the State of New York on the ground that

it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

Counterstatement of Facts

The appellants[1] during the years in issue were partners in the firm of Kirlin, Campbell and Keating, a partnership which is engaged in the practice of law in New York City and Washington, D.C. Capone resided in Virginia. Weil, Hickey and Dye resided in Maryland.

Notices of deficiency for New York State personal income and New York City earnings were issued to the appellants for the years 1976 through 1979, except as noted hereafter, on the basis that they were subject to the taxes on their allocable distributive share of income from the partnership connected with those jurisdictions.

Although Weil was a member of the partnership during 1976 through 1979, deficiencies were issued to him only for 1976 and 1977. Dye was a member of the partnership only during 1976 and 1977 and deficiencies were issued to him only for those years.

The appellants performed services for the partnership in its Washington office. They were not admitted to the New York State Bar and had no office space in New York City. They performed no services for the partnership in New York. Under provisions of the agreements of the partners, however, all gross fees earned by the partners constituted

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[1]The term "appellants" here refers to Ronald A. Capone (Capone), Russell T. Weil (Weil), Robert J. Hickey (Hickey) and Stuart S. Dye (Dye). The spouses of these attorneys are also appellants, but are not discussed hereafter. Ronald A. Capone and his spouse are now deceased; their executor, administrator c/t/a and administratrix c/t/a were substituted in the court below as appellants herein.

fees of the partnership and did not belong to the individual partners. Partners were entitled to receive a distributive share of the net fees and were liable for the losses of the partnership. The allocation of income by the Department was determined from information contained in the file of the New York State Department of Taxation and Finance showing that the partnership income was allocable to New York and Washington as follows:

	New York	Washington
1976	76.9%	23.1%
1977	80.1%	19.9%
1978	74%	26%
1979	79.32%	20.68%

The partnership maintained records of gross receipts and expenses allocated between the New York and Washington offices. During each of the years in issue, the income and expenses of both offices were reported to the partnership's accounting firm which prepared New York State partnership returns. On these returns, each of the appellants was listed a nonresident partner but none of the appellants' income was allocated to New York as its source.

The partnership bookkeeping department, which was located in New York, issued all payroll checks and filed all necessary federal tax forms. A portion of the expense of operating the bookkeeping department was allocated to the Washington office.

The fees generated by the appellants were the result of their activities in the Washington office except for certain matters that generated relatively low fees compared to the other Washington income. Fees earned by the Washington office were billed, collected and deposited by that office.

Data and Washington client matters such as retainer agreements, time sheets and billable hours were kept in the Washington office. It maintained a bank account in the District of Columbia which was separate from the bank account maintained by the New York City office. There were instances where services were rendered to the same client by both the New York and Washington offices. In such instances, fees earned in Washington were billed and collected through the New York office upon fees determined by the Washington office. Fees and disbursements collected by the Washington office were more than sufficient to cover all expenses in maintaining that office as well as the payment of the Washington partners' distributive shares of income.

Following an audit of the partnership's New York tax returns for years prior to the years in issue, a conference had been held in Albany on October 12, 1972 to resolve a potential New York income tax liability of Capone and Washington employees of the firm, including Weil. A portion of the meeting dealt with whether Capone, as a Washington-based nonresident partner, should be required to pay New York income taxes on his income from the partnership. At that time it appeared that nonresident partners working in the New York City office of the partnership were not allocating their shares of partnership income between New York and Washington but were reporting their entire partnership distributive shares as New York City source income.

On November 13, 1972, Capone was advised by telephone that he would have no New York tax liability for 1967 through 1971 on the theory that the Washington office's income exceeded the costs of the Washington office and Capone's share of partnership income. In a letter dated November 22, 1972, a New York State Deputy Tax Commissioner advised the partnership that:

"With respect to the Messrs. Weil and Binder, I have concluded that they were employees of Kirlin, Campbell & Keating. Since they were not residents of New York State aand did not perform any services within New York State, they are not subject to tax on the salaries received from the partnership.

"I have decided not to ask Mr. Capone to file returns for the years 1967 through 1971. The manner in which the nonresident partners attached to the New York office reported their distributive shares of income resulted in tax revenue to the State of New York in an aggregate amount approximating the revenue which would result if I were to insist upon Mr. Capone filing returns for the years 1967 through 1971.

"For subsequent years, I must reserve the right to require a change in the method of reporting partnership income on the individual nonresident returns for any year in which the State of New York would suffer a loss in tax revenue."

The record shows that subsequent to 1975 nonresident partners in the New York office of the partnership were allocating their distributive shares of income from the partnership between New York and Washington. On March 1, 1978 the New York State Department of Taxation and Finance requested the appellants to file income tax returns for the year 1974. An audit of the members of the partnership was expanded to cover the year 1975 and subsequent years. Tax deficiencies were issued only for 1976 through 1979.

The appellants applied for an administrative hearing before the New York State Tax Commission for a redetermi-

nation of the tax deficiencies. Following the hearing, a determination was issued sustaining the deficiencies. Appellants' Jurisdictional Statement pp 12a-28a. The opinion of the New York State Supreme Court, Appellate Division, Third Department, confirmed the determination and is reported at 120 NY AD2d 781 (1986). The Court of Appeals of the State of New York affirmed the judgment of the Appellate Division on October 15, 1987. Its order is reported at 70 NY2d 783.

The appellants' Jurisdictional Statement was received on January 15, 1988.

ARGUMENT

POINT I

New York may tax nonresident partners of a New York partnershp on their allocated distributive share of income from the partnership connected with New York without violating the due process, equal protection, commerce and privilege and immunities clauses of the United States constitution, even where the nonresident partners perform no services in New York.

New York State and New York City impose taxes on the income of their residents. Under New York Tax Law §§ 601, 632 and 637,[2] an income tax is imposed on the New York allocated distributed share of income of nonresident partners derived from or connected with New York sources. New York City also imposes a similar nonresident earnings tax on New York City source income. Administrative Code of the City of New York, §§ 46.1.0(f); U46-4.0(a). Both jurisdictions compute taxable income similarly.

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[2]These sections were renumbered in 1987.

A nonresident partner's distributive share of income from a partnership doing business within and without New York, which is subject to tax by these jurisdictions, is that income from the partnership which is allocated to the New York offices of the partnership. New York Tax Law § 637; Reg. of the State Tax Commission § 131.13 (20 NYCRR 131.13). The allocation methods are similar to those used in allocating New York income of corporations doing business within and without the state, that is generally by using a three factor formula or by a direct accounting method.

State statutes or municipal ordinances imposing taxes upon the income of nonresident individuals that have sources within the taxing states or municipalities have been upheld as against constitutional challenges based on the due process clause (*see, Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 [1920]); the privileges and immunities clause and the equal protection of the laws clause; (*American Commuters Assoc. v. Levitt*, 405 F.2d 1148 [2nd Cir. 1969]); and the commerce clause (*Shaffer v. Carter*, 252 U.S. 37 [1920]). *See also*, Hellerstein, Some Reflections on the State Taxation of Nonresidents Personal Income, 72 Mich. L. Rev. 1309, June 1974. The New York income taxes imposed on nonresident partners meet the requirements stated in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). There, this Court held a state tax must meet the following tests: (1) that the taxed activity must have a substantial nexus with the taxing state; (2) that the tax does not discriminate against interstate commerce; (3) that the tax is fairly apportioned and (4) that the tax is fairly related to services provided by the state.

The activity taxed here has a substantial nexus to New York. The taxed activity is the receipt or crediting of allocated income from a partnership which does business in New York. The partnership agreement provides that all income

of the partnership, whether it is earned from services performed in New York or elsewhere, belongs to the partnership. Nonresident partners of the firm have no separate property right in the income of the firm based on the services which they performed outside New York until it is distributed or credited them. *See*, Uniform Partnership Law, Part V, which has been adopted by most jurisdictions. The nonresident partners' share of income is dependent on the profitability of the partnership as a whole, even if the nonresident partners performing services in Washington, D.C. generate income that is more than sufficient to pay the expenses of the Washington office and their distributive shares. Their share of income under the partnership agreements is not dependent upon the services or the capital which they furnish to the firm.

There is no basis to the appellants' claim that the taxes place an undue burden on interstate commerce. The nonresident partners are not being taxed on income derived from sources outside New York. New York imposes taxes on New York income allocable to nonresident partners because they are receiving income from New York sources. It is only that New York source income which is being taxed by New York and New York City. The tax is thus fairly apportioned.

The income tax imposed on nonresident partners is reasonably related to the services provided by New York a partnership which does business in New York. *See*, *Commonwealth Edison v. Montana*, 453 U.S. 609, 617-627 (1981).

POINT II

New York Tax Law § 620, which gives residents, but not nonresidents, a credit against New York income taxes for income taxes paid to other jurisdictions does not violate the privileges and immunities, the equal protection nor commerce clauses of the United States Constitution.

Contrary to appellants' assertion (Jur. St., pp 32-38), the credit provided to residents under New York Tax Law § 620 is in no way discriminatory. A state's authority to tax residents is greater than its authority to tax nonresidents. Hence, credits for taxes paid to other states may differ. A resident individual may be taxed on his income both in the state in which he resides and in the state from which the income is derived without offending the Constitution. *Curry v. McCauless*, 307 U.S. 357, 368 (1969).

A resident taxpayer is subject to his state's plenary taxing power. *Shaffer v. Carter*, 252 U.S. 37, 52 (1920). With modifications not relevant here, a New York resident is subject to personal income taxes on his income derived from or connected with New York sources, as well as income derived from other jurisdictions, even though some or all of that income is taxed by another jurisdiction. New York Tax Law §§ 611, 612.

By contrast, New York taxes nonresidents only on income which is derived from or connected with New York sources. New York does not tax and constitutionally may not tax nonresidents on their non-New York source income. New York Tax Law §§ 631, 632; *Shaffer v. Carter*, *supra*, 252 U.S. at 52-53; *Travis v. Yale and Towne Mfg. Co.*, 292 U.S. 60, 75 (1920).

New York Tax Law § 620 allows New York resident taxpayers a credit, with certain limitations, against any New York income taxes, for any income tax imposed by another state (including the District of Columbia) "* * * upon income derived therefrom and subject to tax under this article (New York Tax Law, Article 22, Personal Income Tax)." The credit provided by section 620 applies exclusively to non-New York source income which is taxable by New York only by virtue of a taxpayer's New York residency. The credit seeks to avoid double taxation on income that, while properly taxable in New York, is not attributable to New York sources. With respect to New York source income, residents and nonresidents are treated alike. Neither receives a credit with respect to such income.[3] Thus, provisions of section 620 violate neither the privileges and immunities clause nor any other constitutional constraint.

The purpose of the privileges and immunities clause is to assure that no state distributes benefits and burdens in a manner that unduly disadvantages non-citizens of the state; the clause is designed to preclude the treatment of citizens of another state as aliens. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948); *Travis v. Yale and Towne Mfg. Co.*, *supra*, 252 U.S. at 78 (quoting *Paul v. Virginia*, 8 Wall 168, 180 [1868]). A state generally may not impose a tax only

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[3]The application of section 620 without consideration of exemptions and deductions is shown by the following examples: Resident A, resident B, and nonresident C each has a taxable income of $100,000. A pays no income taxes to any other state. He pays taxes in New York on his taxable income of $100,000, regardless of where that income is generated. B pays income tax to another state on $25,000 of his income. Under Tax Law § 620 he gets a credit for the taxes he paid the other state. B's total state taxes will be the same as A's, with 75% being paid to New York and 25% to the other state (assuming the tax rates, etc., are the same in both states). C's income of $100,000 is derived from New York sources to the extent of $75,000. He is taxed in New York solely on that $75,000 and receives no credit for taxes paid to any other jurisdiction on that or any other income.

on nonresidents (*Austin v. New Hampshire*, 420 U.S. 656 [1975]), or prevent nonresidents from participating in a particular trade or business. *Toomer v. Witsell, supra*. It has been held that the clause is not an absolute. It does not preclude disparate treatment of residents and nonresidents where there are valid reasons for such treatment other than the mere fact of nonresidency. *Toomer v. Witsell, supra*, 334 U.S. at 396; *see also, Matter of Goodwin v. State Tax Commission*, 286 App. Div. 694 (3d Dept. 1955), *affd*, 1 NY2d 680 (1956), *appeal dismissed*, 352 U.S. 805 (1956). The clause does not come into play at all unless there is real, rather than just apparent, discrimination against nonresidents. *Travelers' Insurance Co. v. Connecticut*, 185 U.S. 364 (1902).

Assuming *arguendo* that the clause applies here, the fact that only residents are taxed on their non-New York income provides a completely valid and logical reason to limit the credit to them. Since nonresidents pay no New York tax on non-New York income, no credit for taxes paid elsewhere on such income is appropriate.

Appellants' equal protection argument is similarly unavailing. As demonstrated above, any discrimination arguably created by section 620 between residents and nonresidents is a rational one, which is all that equal protection requires. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 363-64 (1973). The credit allowed residents for taxes paid to other jurisdictions on their out-of-state income raises no valid constitutional issue with respect to the treatment of nonresidents' New York income.

The cases relied upon by appellants (Jur. St., pp 34-38) do not show any undue burden on interstate commerce here. *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), involved a tax credit which discriminated against export

shipping from other states. The tax credit here is neutral with regard to income of nonresidents from sources outside of New York. Residents and nonresidents are taxed in the same way on New York source income. In *Austin v. New Hampshire*, 420 U.S. 656 (1975), the New Hampshire tax was designed to tax income of nonresidents which they earned in New Hampshire but effectively exempted income of New Hampshire residents, thus discriminating against nonresidents. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), is also distinguishable from the case here. In that case, sales taxes applied to different bases depending upon the jurisdiction in which equipment used in the taxing state was manufactured. The case did not involve discrimination against nonresidents, vis-a-vis, residents and none is involved here.

POINT III

The United States Constitution was not violated by the termination of a letter agreement dissolving a pending tax controversy for years not in issue here.

Finally, the termination of the 1972 letter agreement involves no constitutional deprivation. The letter agreement in issue, dated November 22, 1972, was made by a New York Deputy Tax Commissioner, resolved the personal income tax liabilities of employees and a nonresident partner of the partnership who provided services for the partnership in Washington, D.C. during the years 1967 through 1971. The agreement is merely a waiver of all of the tax liabilities of those individuals to which the agreement referred for the tax years which were then under consideration. Such agreements are not uncommon and have been terminated for future years not covered by the agreements in situations where they did not conform with the New York Tax Law and resulted in an improper amount of taxes being

reported to New York State. *See, Matter of Petrie Stores Corp. v. Tully*, 80 N.Y. A.D.2d 328 (3d Dept 1981). The agreement did not compromise any tax liability and there was no consideration given for it. Thus the agreement was not a contract.

The letter agreement states that it could be changed for future years if New York suffered a loss in tax revenues as a result of it. At the time that the letter agreement was signed, it appeared that nonresident partners in the New York office of the partnership were not allocating their share of partnership income between New York and Washington, D.C. but were reporting their entire partnership distributive share as allocable to New York for State and New York City tax purposes. For later years, nonresident partners in the New York office of the firm allocated their distributive shares of the partnership's income between New York and Washington, D.C. during the years in issue, 1976 through 1979. As a result, New York would have suffered a net revenue loss because of the allocation by the nonresident New York partners if it also continued to permit nonresident partners, such as appellants, not to pay taxes on that part of their distributive share of New York partnership income derived from New York sources. Plainly, New York was entitled to tax 100% the partnership income derived from New York sources.

Moreover, the letter agreement was not authorized by New York Tax Law § 637(d). It provides: "[t]he tax commission may, on application, authorize * * * other methods of determining a non-resident partner's portion of partnership" income derived from New York sources. The appellants do not claim that an application was made by any member of their partnership to the New York Tax Commission for authorization to allocate the source of their partnership income by a method other than that provided by

statute or the regulations of the Tax Commission. There was no evidence that it was approved by the Tax Commission. The letter agreement was not a section 637(d) authorization.

Accordingly, the termination of the agreement was not an impairment of a contract in violation of the United States Constitution nor a violation of any New York law.

Conclusion

Wherefore, appellees respectfully submit that the questions upon which this case depends are so insubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this case by the Court of Appeals of the State of New York.

Dated: Albany, New York
February , 1988

Respectfully submitted,

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APPENDIX.

Statutes and Regulations Involved

RELEVANT PROVISIONS OF THE NEW YORK TAX LAW:

§ 601. Persons subject to tax

* * *

(b) Partners and partnerships. A partnership as such shall not be subject to tax under this article. Persons carrying on business as partners shall be liable for tax under this article only in their separate or individual capacities.

§ 612. New York adjusted gross income of a resident individual

(a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

§ 620. Credit for income tax of another state

(a) General. A resident shall be allowed a credit against the tax otherwise due under this article for any income tax imposed for the taxable year by another state of the United States, a political subdivision of such state or by the District of Columbia, upon income both derived therefrom and subject to tax under this article.

§ 632. New York adjusted gross income of a nonresident individual

(a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

(A) his distributive share of partnership income, gain, loss and deduction, determined under section six hundred thirty-seven * * *

§ 637. Nonresident partners

(a) Portion derived from New York sources.

(1) In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income, as such portion shall be determined under regulations of the tax commission consistent with the applicable rules of section six hundred thirty-two.

* * *

(b) Special rules as to New York sources. In determining the sources of a nonresident partner's income, no effect shall be given to a provision in the partnership agreement which—

(1) characterizes payments to the partner as being for services or for the use of capital, or

(2) allocates to the partner, as income or gain from sources outside New York, a greater proportion of his distributive share of partnership income or gain than the ra-

tio of partnership income or gain from sources outside New York to partnership income or gain from all sources, except as authorized in subsection (d), or

(3) allocates to the partner a greater proportion of a partnership item of loss or deduction connected with New York sources than his proportionate share, for federal income tax purposes, of partnership loss or deduction generally, except as authorized in subsection (d).

• • •

(d) Alternate methods. The tax commission may, on application, authorize the use of such other methods of determining a nonresident partner's portion of partnership items derived from or connected with New York sources, and the modifications related thereto, as may be appropriate and equitable, on such terms and conditions as it may require.

RELEVANT REGULATIONS OF THE NEW YORK STATE TAX COMMISSION IN EFFECT FOR THE YEARS UNDER REVIEW

Methods of Allocating Income and Deductions From Sources Within and Without New York State

131.13 Apportionment and allocation of income from a business carried on partly within and partly without the State. If a nonresident individual, or a partnership of which a nonresident individual is a member, carries on a business, trade, profession or occupation both within and without the State, the items of income, gain, loss and deduction attributable to such business, trade, profession or occupation must be apportioned and allocated to this State on a fair and equitable basis in accordance with approved methods of accounting.

(a) If the books of the business are so kept as regularly to disclose to the satisfaction of the Tax Commission the proportion of the net amount of the items of income, gain, loss and deduction derived from or connected with New York sources, the return of the taxpayer shall disclose the total amount of such items, the net amount of such items allocated to New York, and the basis upon which such allocation is made.

(b) If the books and records of the business do not disclose to the satisfaction of the Tax Commission the proportion of the net amount of the items of income, gain, loss and deduction attributable to the activities of the business carried on in New York, such proportion shall, except as provided in section 131.14 and subdivision (b) of section 116.7 be determined by multiplying (1) the net amount of the items of income, gain, loss and deduction of the business by (2) the average of the following percentages:

(i) *Property percentage.* (a) General. The percentage computed by dividing (1) the average of the values, at the beginning and end of the taxable year, of real and tangible personal property connected with the business and located within this State by (2) the average of the values, at the beginning and end of the taxable year, of all real and tangible personal property connected with the business and located both within and without this State. For this purpose, real property shall include real property rented to the taxpayer and used in the business. Real property the income or gain from which is allocated pursuant to section 131.14 of these regulations shall be disregarded in computing the property percentage described in this paragaraph.

(b) *Rented real property*. (1) The fair market value of real property, both within and without New York, which is rented to the taxpayer shall be determined by multiplying the gross rents payable during the taxable year by eight.

(2) Gross rents as used in this clause is the actual sum of money or other consideration payable directly or indirectly by the taxpayer or for its benefit for the use or possession of the property and includes:

(i) any amount payable for the use or possession of real property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise;

(ii) any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement;

(iii) a proportionate part of the cost of any improvement to real property made by or on behalf of the taxpayer which reverts to the owner or lessor upon termination of a lease or other arrangement, based on the unexpired term of the lease commencing with the date the improvement is completed (or the life of the improvement if its life expectancy is less than the unexpired term of the lease), provided, however, that where a building is erected on leased land by or on behalf of the taxpayer, the value of the land is determined by multiplying the gross rent by eight, and the value of the building is determined in the same manner as if owned by the taxpayer. The proportionate part of the cost of an improvement (other than a building on leased land) is generally

equal to the amount of amortization allowed in computing New York adjusted gross income, whether the lease does or does not contain an option of renewal.

(3) Gross rents do not include:

(i) any portion of a payment or credit to the proprietor of the business or to a partner in the partnership conducting the business for the use of real property;

(ii) amounts payable as separate charges for water and electric service furnished by the lessor;

(iii) amounts payable for storage where no designated space under the control of the taxpayer as a tenant is rented for storage purposes;

(iv) that portion of any rental payment which, in the discretion of the Tax Commission, is applicable to property subleased by the taxpayer and not used by him or it in the carrying on of the business.

(c) If the general method outlined herein results in valuations which are inaccurate or which are not fair and equitable, any other method which will fairly and equitably reflect the value may be adopted by the Tax Commission either on its own motion or on request of a taxpayer. A request by a taxpayer for an alternative method may be made at the time of the filing of the return to which it relates by using the proposed method in the return provided the method is fully explained in the return. Any request should contain all facts with respect to the property forming the basis for the proposed valuation and also a computation of the value of the rented real property based on gross rents in accordance with clause (b) above. Such basis or such other method once approved by the commission may be used

without specific approval for subsequent years until the facts upon which it is based are materially changed.

(ii) *Payroll percentage.* The percentage computed by dividing (a) the total wages, salaries and other personal service compensation paid or incurred during the taxable year to employees in connection with the business carried on within this State, by (b) the total of all wages, salaries and other personal service compensation paid or incurred during the taxable year to employees in connection with the business carried on both within and without this State.

(iii) *Gross income percentage.* The percentage computed by dividing (a) the gross sales or charges for services performed by or through an office, branch or agency of the business located within this State, by (b) the total of all gross sales or charges for services performed within and without this State. The sales or charges to be allocated to this State shall include all sales negotiated or consummated, and charges for services performed, by an employee, agent, agency or independent contractor chiefly situated at, connected by contract or otherwise with, or sent out from, offices, branches of the business, or other agencies, situated within this State.